

Negotiation and Escalation. The parties initially shall attempt to resolve disputes arising in the ordinary course of the parties' performance under this Agreement through the good-faith negotiation of the parties' project managers. If, after three (3) business days of good-faith negotiations, the parties have not been able to resolve any dispute, then each party shall prepare a written notice describing the nature of the dispute in reasonable detail and the attempted resolution ("Dispute Notice"), and shall submit the Dispute Notice to each party's appropriate senior-level executive, who shall attempt in good faith to resolve the dispute within five (5) business days from receipt of the Dispute Notice. If the parties have not been able, in good faith, to resolve the dispute following escalation of the Dispute Notice to each party's senior-level executive, then the parties may take any legal action in a court of law or equity to assert or enforce a claim it has against the other party under this Agreement. The final resolution of any such disputes between the parties hereto shall be reduced to writing.

Continuity of Services. Under no circumstance, including, but not limited to, the pendency of any dispute, may the EHR Vendor repossess or disable the Software, render the Software unusable, or terminate or suspend or limit any of its performance, or any licenses hereunder, including its duty to provide Services, unless and until Customer agrees in writing to such termination, suspension, or limitation, or a court of competent jurisdiction so determines.

[THE FOLLOWING TWO CLAUSES ARE MUTUALLY EXCLUSIVE OPTIONS AND YOU SHOULD SELECT ONE OR THE OTHER CLAUSE DEPENDING UPON YOUR PREFERENCE FOR EITHER LITIGATION OR ARBITRATION:]

[OPTION 1] Legal Action. If either party believes in good faith that the procedures described in this Section will have a material adverse impact on such party, then the parties may take any legal action in a court of law or equity to assert or enforce a claim it has against the other party under this Agreement.

[OR]

[OPTION 2] Arbitration. Any dispute arising out of or relating to this Agreement or the subject matter thereof, or any breach of this Agreement, including any dispute regarding the scope of this provision, shall be resolved through arbitration administered by the [American Arbitration Association (AAA) or the Judicial Arbitration and Mediation Service (JAMS) or American Health Lawyers Association (AHLA) Dispute Resolution Service] and conducted pursuant to the [AAA or JAMS or AHLA] Rules of Procedure for Arbitration.

9. TRANSITION ISSUES: SWITCHING EHRs

You may at some point need to consider switching EHRs if your existing EHR contract ends or your current EHR vendor:

- has not developed functionality that will enable you to comply with new regulations, quality reporting initiatives, or payment models;
- failed to disclose additional costs that must be paid to realize the full benefit of the EHR's functionality or limitations that have interfered with your ability to access or use the EHR's capabilities;
- did not provide agreed upon customizations that are critical to the manner in which you deliver patient services;
- provided a level of support services with which you are dissatisfied;
- was responsible for a security failure that had serious consequences for you organization or your patients;
- increased prices significantly when it was time to renew the contract;
- decided to discontinue support for your specific EHR (or exited the market entirely); or
- was acquired by another company that stops supporting your current EHR and wants you to switch to another EHR that you do not find acceptable.

You may also need to switch your EHR if you are unable to integrate its functionality with existing clinical workflows or if your business needs have changed so that your current EHR does not provide sufficient functionality to meet new clinical demands.

Switching EHRs can be costly and disruptive. It also presents a range of operational and clinical risks, not least of which is the significant risk that you will lose access to both patient and business records or that the data will be incomplete or corrupted. The significant costs of transition may include the cost of hiring external resources and the time your own staff will need to devote to the system conversion.

Some of these risks can be reduced by ensuring that you and your vendor discuss these issues at the outset of your relationship and negotiate appropriate transition provisions in your EHR contract. Unfortunately, very few EHR vendors include **any** transition provisions in their standard form contracts. As a result, you will typically need to negotiate with your preferred EHR vendor to include specific transition rights and obligations in your EHR contract to minimize the disruption and risk that might arise should you need to switch vendors in the future.

9.1 Length of Support Commitment

In addition to negotiating the inclusion of specific transition rights and obligations into your EHR contract (as discussed below), you can establish some basic protections against the risk and disruption of switching EHRs by ensuring that the duration of your EHR contract is appropriate and that you have options to renew at reasonable prices.

If your EHR vendor provides you with EHR software under license, your EHR contract will typically limit the period of time during which the EHR vendor will support the EHR. This is usually the case even if the contract grants you a “perpetual” license to use the software. The length of the vendor’s support commitment effectively limits how long most customers will be able to use the software even if the license term is longer. For example, if the EHR vendor is no longer answering questions, fixing bugs, and providing enhancements for the software to comply with new regulations, most customers will need to

find another EHR because they do not have the technical information or resources to take on those responsibilities.

Conversely, if your EHR is provided under a cloud-based EHR model, the service contract will be for a specified time period but will often contain automatic renewal periods. This means that the contract will continue in effect for the renewal period unless either party objects by a specific date. If you do not wish to renew, there is a risk that you may forget to object and find yourself locked into an automatic renewal period. You may therefore want to change the renewal period provision so that the EHR contract does not renew unless you give affirmative notice of renewal. If possible, the vendor would always be obligated to continue to provide the services in the renewal period so the decision would be solely up to you.

Different problems may arise if the EHR vendor has the right to not renew the EHR contract (or the support agreement for licensed software). If the period for notice of non-renewal is too short for you to find and transition to another EHR, the current EHR vendor can use this right as leverage to increase fees. For example, if the contract permits the vendor to give notice of non-renewal 90 days prior to expiration of the current term, would that be enough time for you to select and start transitioning to a new EHR? If the EHR vendor has been acquired by another vendor that now wants you to switch to another EHR, it may use its right of non-renewal to cause you to switch and possibly charge you additional fees. As a practical matter, you should keep close track of renewal dates and begin considering your options well in advance of when notices related to renewal must be provided.

In addition to negotiating the renewal provisions, you need to carefully evaluate the length of the initial term of the EHR vendor’s services and support in both cloud-based and licensed EHRs. For example, at first you may want the initial support or service term to be short (to minimize your financial commitment). However, it may reduce your transition-related risk if your EHR contract obligates the vendor to support or provide services for a longer term if you decide to renew (at your sole option). The vendor may attempt to resist this contractual obligation by arguing that

you should in turn be committed to use (and pay for) the support or service for the same (longer) period that you are asking the vendor to commit to. Your counterargument would be that the EHR vendor will not incur much additional cost if you do not renew the support or services, as opposed to the very significant adverse impact to you if support or service is withdrawn.

It is beyond the scope of this guide to offer specific suggestions regarding pricing. However, you may wish to negotiate caps on future price increases upfront to limit the amounts that the EHR vendor may seek to impose for the renewal periods of the EHR service or support contract.

9.2 Commitment for Transition Services and Data Portability

There are many reasons you may find yourself transitioning from one EHR to another, but whatever the reason you are likely to need assistance to achieve a seamless transition. In some situations, it may be extremely difficult to have an effective transition without significant cooperation and assistance from your outgoing EHR vendor. An EHR vendor's willingness to agree to reasonable transition services should be a significant factor in your selection of an EHR.

It may be impossible to predict at the time you are negotiating your EHR contract exactly what transition services you will require, but it is important to at least obtain the EHR vendor's general agreement to provide a reasonable degree of transition assistance. Contract terms that support an orderly transition from your current EHR will structure, speed up, and simplify what can be a very time-consuming, expensive, and difficult process. While there may be a range of other transition details to consider, at a minimum you should try to negotiate the following terms:

(a) Software License

The EHR vendor should grant you the right to use the software during a stated transition period following the end of the services (for a reasonable stated fee if necessary).

(b) Transition Support Services

The EHR contract should require the EHR vendor to continue to provide support for the EHR during the transition period at the same level set forth in the EHR contract or, at a minimum, at the same level as received by other customers. This may be of particular importance if disaster recovery services are needed during a transition period.

(c) Data Transfer and Conversion

An outgoing EHR vendor should be required to provide assistance with transitioning data to a new EHR vendor's system. Your outgoing EHR vendor may store your EHR data in a format that is optimized for the vendor's proprietary system and which cannot be deployed into a new EHR without first being converted (sometimes referred to as data conversion). In the absence of a contractual obligation that specifies the EHR vendor's data transfer requirements, your outgoing EHR vendor may take the position that it can satisfy its obligations by providing you with all historical records in a format that is inconvenient or impractical rather than working with you in good faith to deliver the records in a standardized structure and format that is then generally accepted in the health IT industry. It is also helpful to specify a deadline for all data conversion so the implementation of your new EHR is not delayed by the outgoing EHR vendor unexpectedly providing the data in multiple batches over a period of weeks or even months.

The consequences of not reaching agreement on data transfer and conversion could be far reaching. For example, if your patient records are not provided in a format that makes them fully accessible in your new EHR, your health care professionals may be unable to rely on clinical decision support tools provided in your new EHR that use the old data such as automated drug interaction checking and allergy reminders. Further, if data is not provided in an appropriate format, you will incur the time and costs associated with converting the data to a usable format. When negotiating this requirement you may need to stress to your EHR vendor that if it is unwilling to agree upfront to providing appropriate assistance when transferring data to a new EHR, you will require that it provide you with access to the tools necessary to

undertake this work yourself. This may include access to the EHR vendor's data dictionary, database structure, or other intellectual property. See Section 5 – *Fostering Interoperability and Integration* for a discussion on obtaining access to information about the vendor's data structure or model.

9.3 Example Contract Language for Transition Services

The following language is a starting point in negotiating transition services, but it needs to be tailored to your specific situation with legal advice and possibly technical advice regarding the format of the data, length of time for transition services, and other details.

Example Contract Term 23

Transition Services

Upon the expiration or termination of this Agreement for any reason, EHR Vendor shall provide the services described below (the "Transition Services") for up to _____ () months if requested by Customer (the "Transition Period"). Transition Services shall consist of the following to the extent requested in writing by Customer:

(a) continuing to provide the Services required under this Agreement as of the date of termination (including applicable service levels and disaster recovery services), or such subset of such Services as Customer may direct; and

(b) providing all reasonable cooperation to Customer, its contractors and replacement EHR vendor(s) in order for Customer to transition its data to a successor system, including: (i) working in good faith to provide all data in a standardized format and structure that is then generally accepted in the health IT industry or is otherwise acceptable to the Customer; or (ii) assisting with the conversion of such data for use in a new EHR.

The parties shall negotiate reasonably and in good faith to agree on details of the Transition Services including the deadline for completion of data conversion services.

Transition Fees

(a) Subject to (b), the Transition Services shall be provided by EHR Vendor for the following fees: _____ payable as follows: _____. Such fees shall not exceed the then current hourly rates that would be charged by EHR Vendor for similar services provided under this Agreement.

(b) Notwithstanding the foregoing, in the event that the Agreement is terminated by the Customer on the basis of the EHR Vendor's breach of this Agreement, including a breach of the EHR Vendor's warranty that the EHR system is certified under the Current Requirements, then the EHR Vendor shall provide the Transition Services free of any fee, charge or set off.

Your EHR vendor may wish to include additional rights and obligations in any negotiated transition provision. For example, depending on the scope of transition services to be provided, your vendor may want a reasonable amount of notice of your need for transition services. It may also seek to limit the number of hours that it will commit to spend providing ongoing transition services. These concessions may be reasonable, provided they do not limit the vendor's core transition services obligations under the contract.

In addition, your EHR vendor may prefer not to specify a fixed price for transition services and instead provide that such services will be billed at the vendor's future prevailing rates. You should be aware that fees for data transfer and conversion vary widely across the industry and may increase significantly over the term of your contract. Therefore, if you do agree to accept a vendor's future prevailing rates instead of a fixed fee, you should stipulate an agreed-upon base price and/or rates and provide that any increases shall not exceed an agreed-upon amount.

Because transferring and converting your data may require providing third parties with access to software or documentation needed to map or convert data, your outgoing EHR vendor may require that the new EHR vendor sign a confidentiality agreement as a condition of gaining access to this intellectual

property. This may be acceptable so long as the confidentiality provisions are reasonably necessary to ensure the confidentiality of the outgoing EHR vendor's intellectual property and are not drawn in such a way as to frustrate your new EHR vendor's ability to access and facilitate the conversion of the EHR data.

9.4 Accessing Previous EHR Software

Software licenses typically require that you return all copies of the software and related documentation at the end of the license term. Similarly, cloud-based services agreements provide that services will end upon termination. These provisions are rarely negotiated but it is best practice to do so because you may need access to the software of your previous EHR in the future in order to respond to investigations or litigation. Possible exceptions to the obligation to return licensed software could be stated in an EHR contract for a provider-hosted EHR as follows:

Example Contract Term 24

Customer may retain a secure archival copy of the most recently used Software, all previous versions, and all documentation for use in responding to e-discovery requests for Documentation in its "native format."

Customer may use the archived software in litigation, arbitration, or government investigations regarding reimbursement, malpractice, or other matters in which the use of such items would help establish what information was known to Customer and its EHR users at the time in question and how it appeared.

The second paragraph above could be important to you in the defense of a medical malpractice claim since it may be necessary to use an old version of the EHR vendor's software to determine what information could have been available to a health care professional who reviewed a patient's records at a particular point in time.

If your EHR vendor provides the EHR as a service under a cloud model, you typically would not have

received the software. Therefore the EHR contract should impose an obligation on the vendor to maintain copies of all software versions and to provide services to facilitate your access to the software in the circumstances discussed above. You could include a mechanism in your EHR contract to pay a reasonable amount for these services (if the vendor required).